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No. 06-1527

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In The

Supreme Court of the United States

SERGES JACQUES DESCENT
a.k.a. JACK DESCENT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR REHEARING

SERGES JACQUES DESCENT
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Petitioner

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PETITION FOR REHEARING

The Petitioner, SERGES JACQUES DESCENT (Mr. Descent), petitions this Court for a rehearing in this case following the final decision rendered on June 18, 2007, pursuant to S. Ct. Rule 44. This instant petition is timely filed and within the time limitations period set forth in S. Ct. Rule 44. This case presents a question of exceptional importance involving constitutional issues.

REASON FOR GRANTING PETITION FOR REHEARING

Mr. Descent seeks a rehearing on the question presented in the Final appeal – a question dealing head-on with the issue of the Eleventh Circuit Court of Appeals promulgating a local rule [41-(c)] which places a one-year time limit to recall a mandate unless the movant first establishes "good cause" for the delay in filing motion.

The question presented here is simply one of law; can the Eleventh Circuit Court of Appeals create a local rule that *limits the tendering of a motion to "recall a Mandate" filed more than a year after issuance of a mandate unless the Movant First establish "good cause" for the delay in filing the motion*. Mr. Descent respectfully submits that the answer to this standing question must be answered in the negative; that is, the enactment of Eleventh Circuit Rule 41-1(c) on its face is repugnant to this Court's General Provision as promulgated in Federal Rules of Appellate Procedure Rule 47(a)(2). This question is of exceptional importance as this Court is the sole Authority of the Federal Rules of Appellate Procedure. This Court has always supported any infractions of these rules, and to allow the

Eleventh Circuit's local rule to stand would create such an infraction.

Federal Rules of Appellate Procedure 47(a)(2) governs Local Rules by Courts of Appeals and states that "[a] local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a non willful failure to comply with the requirement." Applying this Rule to the Eleventh Circuits L.R. 41-1(c) unveils the fact by imposing a one-year time limitation forces a defendant to lose his Constitutional right to Due Process.

Additionally. "the right of access to the courts is founded in the due process clause and assures that no person will be denied the opportunity to present to the judiciary, allegations concerning violations of fundamental constitutional rights". *Wolf v. McDonnell*, 418 U.S. 539, 41 L. Ed.. 2d 935, 94 S. Ct. 2963 (1974), at 941.

Specifying a time limitation is not only in conflict with this Court's promulgation in F.R.A.P. 47(a)(2) but is contrary to the remaining sister circuits as well. The Second Circuit held in *Fine v. Bellefonte*, 758 F.2d 50 (2nd Cir. 1985) that "a motion to recall or modify the mandate may be made at any time". (quoting 2 Cr. R. 27(c)). It has been long held that "courts of appeals have asserted the power (analogous to that conferred on the district courts by Fed. R. Civ. P. 60(b) to recall a mandate, in effect reopening the case, without limit of time, although only in exceptional circumstances". *Johnson v. Bechtel Associates Professional Corp.*, 255 U.S. App. D.C. 198, 801 F.2d 412, 416 (D.C. Cir. 1986); 16 Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*, Section 3938 (1977). "*Patterson v. Crabb*, 904 F.2d 1179 (7th Cir 1990)".

> "[C]ourts of appeals", as Judge Posners has explained, "have asserted the power . . . to recall a

> mandate, in effect reopening the case, without limit of time, although only in exceptional circumstances." *Patterson v. Haskins*, 460 F.3d 645 (6th Cir. 2006); see also *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005).

MOREOVER, it is equally important to add that since the Eleventh Circuits' Local Rule 41-1(c) has no history, it would be safe to conclude that this Rule was created when the Eleventh Circuit split from the Fifth Circuit on September 30, 1981. At that time, the Federal Rules of Appellate Procedure 47(a)(2) was non-existent as it did not appear until it was promulgated in the 1995 Amendments. Naturally, between 1981 and until 1995 Amendments there was no reason to challenge this rule. However, since 1995, the Eleventh Circuits Rule stands in conflict with F.R.A.P. 47(a)(2), thus a violation of the Due Process Clause of the Fifth Amendment to the Constitution.

CONCLUSION

For the foregoing reason, the instant Petition for Rehearing should be granted, declare the Eleventh Circuit Rule 41-1(c) unconstitutional, and the Appellate Court recall its mandate so that Petitioner may be re-sentenced consistent with the new forfeiture amount.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. The Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

SERGES JACQUES DESCENT